
OFFICE OF THE ATTORNEY GENERAL
Official Opinion No. 2021-1

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The Honorable Peggy Mayfield
Indiana House of Representatives
200 W. Washington Street
Indianapolis, Indiana 46204

The Honorable Andy Zay
Indiana State Senate
200 W. Washington Street
Indianapolis, IN 46204

RE: University policies on COVID-19 vaccination

Dear Representative Mayfield and Senator Zay:

You both have requested an opinion concerning whether the recently announced policies by Purdue University and Indiana University to require proof of a COVID-19 vaccination is violative of Ind. Code ch. 16-39-11, as added by HEA 1405 (2021), prohibiting the necessity of an immunization passport.

BRIEF ANSWER

Public universities, or "state educational institutions", through their boards of trustees, are bodies corporate and politic. They are legislatively created and receive their corporate powers through legislation. Numerous cases have also held public universities to be "arms of the state." Ind. Code ch. 16-39-11 provides no statutory exemption for universities, so as public universities are part of "the state", it applies to them.

HEA 1405 only prohibits public universities from requiring proof of the COVID-19 vaccine; it does *not* prohibit them from requiring the vaccination itself. In its current form, Purdue University's policy does not appear to violate HEA 1405. Based on the information available, it seems Purdue will require vaccination only for certain optional activities, which is nothing new; limitations – although not COVID-19 vaccination – for certain groups have been a requirement since the onset of the pandemic (e.g., quarantine for college and professional athletic teams throughout 2020). Students have the choice whether to vaccinate or be tested regularly; even if they are vaccinated, they can be tested if they do not want to show proof of vaccination. Purdue seems to be using a procedural loophole by not technically *requiring* the vaccinated student to produce the immunization record. If it does, or it requires any student or subgroup of students to do so, then it will be in clear violation of Ind. Code ch. 16-39-11.

Indiana University's policy, however, unquestionably violates the new law. IU explicitly states in its announcement and on its FAQ page¹ that all students, faculty, and staff must use a specific COVID-19 vaccination reporting form and provide proof of vaccination in the form of an upload or scan of their vaccination card. Furthermore, providing documentary evidence of being fully vaccinated from COVID-19 is a prerequisite to continued employment for faculty and staff, and continued enrollment at the university for students. IU provides no alternative or option to vaccination for its students, faculty, or staff, and has noted that exemptions will be limited.

ANALYSIS

Public universities as "arms of the state"

A central question to this analysis is whether the new law applies to public universities. HEA 1405 prohibits "the state or a local unit" from issuing or requiring an immunization passport. At least one author of the bill has indicated to the media the new law was not intended to apply to public universities, and universities may argue they are not "the state or a local unit." However, nowhere in Ind. Code ch. 16-39-11 are universities exempted from the statute's application or from the term "state". Legislative history does not provide any indication of the intent to exclude universities, either. Consequently, a clear legislative intent is not ascertainable, and this analysis will focus on the interpretation of the statute as it appears in HEA 1405.

The word "state" is amorphous, and can include an agency or department, instrumentality, and official or employee of the state. 26 Ind. Law Encyc. State § 1. Moreover, case law is replete with observations that public universities are instrumentalities or arms of the state. See *Severson v. Bd. of Trustees of Purdue Univ.*, 777 N.E.2d 1181, 1191–92 (Ind. Ct. App. 2002) (citing several cases from Indiana federal district and Seventh Circuit courts); see also generally *State Bd. of Accts. v. Indiana Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995) (The Board of Trustees for Indiana University is a body politic created by law, but it can also act as a trustee of private funds.). The notion that a state educational institution is not part of the state because it is separately defined in the law and not as a "state agency" views the complex relationship between public universities and a state, as well as "the state" and what encompasses that term, in an overly facile manner.

Kashani v. Purdue University explored whether a public university is an instrumentality of the state entitled to sovereign immunity and ultimately held that it was. *Kashani*, 813 F. 2d 843 (1987). The court examined whether Purdue was more like a city or county (i.e., more independent local unit of government) than an arm of the state. *Id.* at 845 (quoting *Mount Healthy School District v. Doyle*, 429 U.S. 274, 280 (1977)). It noted the Eleventh Amendment question for state universities was not novel and pointed out that no case law held a state university was not entitled to it. *Id.* *Kashani* listed the criteria a court looks to in deciding whether a university enjoys sovereign immunity as an arm of the state. Its financial dependence upon the state is "the most important factor" and includes: "the extent of state funding, the state's oversight and control of the university's fiscal affairs, the university's ability independently to raise funds, whether the state taxes the university, and whether a judgment against the university would result in the state increasing its appropriations to the university"; it noted, too, that the state's Budget Agency Act defines public universities as a "state agency". *Id.*; see Ind. Code § 4-12-1-2(d); see also Ind. Code § 5-11-1-16(b). After a review of all factors, the court determined Purdue was not fiscally autonomous from the state. *Id.* at 846.

Kashani did not just examine Purdue's financial affairs; it also considered the university's legal status. Public universities are bodies corporate and politic that can exercise some of the state's political powers through its board of trustees.² 18 C.J.S. *Corporations* § 13. The board of trustees is statutorily created and has power and authority conferred to it through legislation. 11 Ind. Law Encyc. *Education* § 229; 15A Am. Jur. 2d *Colleges and Universities* § 4. Ind. Code ch. 21-39-2 grants the boards of trustees of Indiana's public universities the authority to govern and regulate conduct on campus property and the power to discipline any student, faculty member, or employee who violates the university's rules or standards of conduct, among other powers and duties. Although technically independent in its powers and duties, since the majority of its members are appointed by the Governor and the legislature retains power to amend or repeal those duties, the trustees' independence is limited. *Kashani*, 813 F. 2d at 847. The court found this authority to be like a delegation of authority to an instrumentality of the state rather than the independent authority of a local unit, such as a city or county. *Id.*

Contrast *Kashani* with *Burrus v. State Lottery Comm'n of Ind.*, which held the State Lottery Commission ("Hoosier Lottery") was not a state agency and therefore not entitled to Eleventh Amendment immunity. *Burrus*, 546 F.3d 417 (2008). The *Burrus* court also examined the fiscal state of the Hoosier Lottery. *Id.* The language in its enabling statutes indicated intention to make the Hoosier Lottery independent from the state – "a separate body politic and corporate from state government" and "to function 'as much as possible as an entrepreneurial business enterprise'". *Id.* at 418 (citing Ind. Code § 4-30-1-2(1) and (3); emphasis added). Although the commission and its director are appointed by the governor, it operates substantially independent of the state and is fiscally autonomous from it. *Id.* at 418-19. A public university does not have the specific exclusionary language found in the lottery statutes, nor is it financially independent from the state like the Hoosier Lottery. Therefore, *Kashani* is more applicable to a public university's status as an arm of the state.

In context of Indiana statutory and case law, public universities are a part of "the state." Ind. Code § 16-39-11-5(a) uses the general term "state" and more specific "local unit" when proscribing the issuance or requirement of vaccine passports. As "state" is not parsed out to apply only to agencies, instrumentalities, boards, or any other state "unit," the rules of statutory interpretation indicate the law should be read to apply to all parts of the state, which includes state educational institutions. Ind. Code ch. 16-39-11 includes no specific exemption for universities, therefore, it applies to Indiana public universities as part of "the state".

New "vaccine passport" law and other relevant statutes

Ind. Code ch. 16-39-11

Ind. Code ch. 16-39-11 specifically relates to the COVID-19 vaccine only (see page 9 of HEA 1405). Section 3 defines "immunization passport" as information regarding an individual's immunization status. Section 2 of the

chapter defines "immunization" as the COVID-19 vaccine, so a fair reading of section 3 would be that the passport and status also indicate these are for COVID-19 only. Ind. Code § 16-39-11-5(a) prohibits the state or a local unit from issuing or requiring an immunization passport. Subsection (b) clarifies that it does not prohibit them from keeping a record of an individual's immunization status, providing a medical record of said status to the individual's provider or the individual upon request, or maintaining an immunization record for public health administration purposes.

It is important to note what Ind. Code ch. 16-39-11 does and does not do. It only prevents the state and local units from *requiring or issuing vaccine "passports"* that indicate an individual's immunization status regarding the COVID-19 vaccine. It does not, however, prohibit any entity from requesting it, provided no negative consequence arises from not producing the record; if it did, then it would appear to be a "requirement" and not a mere request. The new law also does not prevent universities, or any other entity, from *requiring vaccination* as a prerequisite for attendance to a function, employment, or other program or activity. As far back as 1905, the Supreme Court has held that the state can mandate vaccines and impose other "reasonable regulations" in the interest of public health. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). A handful of cases since then have also upheld that the state can impose mandatory vaccination requirements for public health purposes. For purposes of Ind. Code ch. 16-39-11, it is difficult to imagine a process whereby an entity could mandate the COVID-19 vaccine with no other alternative to vaccination and institute negative consequences for failure to vaccinate, but not require documentation or proof of vaccination. Although it is not necessarily contrary to Ind. Code § 16-39-11-5(a) to require the COVID-19 vaccine for students and employees, requiring them to provide proof of it is in clear violation of the statute.

Immunization Statutes

The Indiana Department of Health ("IDOH") is statutorily tasked with establishing the rules and procedures for the monitoring, reporting, and surveillance of communicable disease. Ind. Code § 16-41-2-1. It is also responsible for administering the state immunization registry. Ind. Code § 16-38-5. Currently, the IDOH strongly encourages individuals to get the COVID-19 vaccination but does not mandate its administration through rule or law.

Indiana law requires public universities to have on file for each student that will reside on-campus documentation of immunization against the following communicable diseases: diphtheria, tetanus, measles, mumps, rubella, and meningitis. Ind. Code § 21-40-5-2(a); see also Ind. Code § 21-40-5-9. Students can have exemptions for limited reasons under Ind. Code § 21-40-5-4. IDOH is prohibited from expanding or modifying the list in Ind. Code § 21-40-5-2(a). Ind. Code § 21-40-5-13.

Current university policies and Ind. Code ch. 16-39-11

Purdue University

At this point, it is not clear that Purdue University is in violation of the new law. For fall semester 2021, Purdue is introducing its "Year Two Purdue Pledge," which requires students to do one of two things: get fully vaccinated and successfully submit valid documentation before coming to campus; **or** participate in frequent mandatory surveillance testing. If students provide valid documentation of vaccination against COVID-19, they will be exempt from the mandatory testing and "may have greater amounts of choice as it pertains to activities on campus." Purdue also states it will randomly audit records submitted as proof of vaccination for validity and will discipline students found to have submitted falsified records. Purdue has not, however, set forth the process for submitting a record, or what it considers to be a sufficient proof of vaccination. Again, though, this documentation requirement is only for students who choose to do so and wish to be recognized by the university as fully vaccinated. Letters to students and faculty stated that the Trustees would "review, discuss, and ratify an updated Protect Purdue Pledge and other Protect Purdue policies."³ This future meeting may provide greater detail on restrictions and what specific activities will require vaccination before participation.

This is not to say Purdue, or other entities subject to the statute, have free reign to mandate vaccines and require proof of vaccination status in violation of Ind. Code ch. 16-39-11. The Pledge requires either vaccination/proof of vaccination or the mandatory surveillance testing for all students, regardless of whether they live in on-campus housing, are college athletes, study abroad, or want to participate in other campus activities. Thus, Purdue's policy is uniform and applied consistently across the entire student population. It permits even vaccinated students to not provide the university with their immunization status if they are willing to be tested for COVID-19. However, if any department or subgroup within the university attempts to mandate the vaccination and require proof of it as a prerequisite to participation, this could be a violation of the statute. For example, if a college athlete is required by the coach or athletic department to get the COVID-19 vaccine and provide evidence

of vaccination to keep their Purdue-sponsored scholarship – removing the second option of testing – this likely violates the statute; there is no "choice" for the athlete but to provide his or her immunization status if the athlete wants to keep the scholarship.

Indiana University

Indiana University's policy clearly violates the prohibition set forth in Ind. Code ch. 16-39-11 of requiring vaccine passports. IU now requires all students, faculty, and staff members to be vaccinated. This requirement itself is not a violation of the statute and is legally permissible. However, the university then further requires the individual to use a COVID-19 self-report form to declare information regarding their immunization, and they then must upload a scan or photo of their vaccine card. These actions are specifically prohibited under Ind. Code § 16-39-11-5(a).

Unlike Purdue, IU gives students, faculty, and staff no other option or alternative to vaccination. Students who fail to comply "will have their class registration cancelled, CrimsonCard access terminated, access to IU systems (Canvas, email, etc.) terminated, and will not be allowed to participate in any on campus activity." Faculty and staff who refuse "will no longer be able to be employed by Indiana University" and "[w]orking remotely to avoid meeting the COVID-19 vaccine requirement is not an option." IU representatives have also stated on multiple occasions that exemptions to the requirement, which will be available beginning June 15, would be "strictly limited."⁴ This policy does not just apply to "optional" activities, where individuals can simply opt out of participation if they do not wish to vaccinate. Furthermore, there is no alternative to vaccination, such as submitting to mandatory surveillance testing. IU provides no choice to its students, faculty, and staff – not only must they be vaccinated, but they must also provide proof of it to the university to maintain their status as a student or employee. This seems precisely what the new law was intended to avoid.

IU mentions it may also ask its students, faculty, and staff for permission to access their CHIRP records; CHIRP is the Indiana immunization registry. Ind. Code § 36-9-11-5(b)(1) and (4) does not prohibit the state or a local unit from maintaining or storing a record of an individual's immunization status, or from maintaining an immunization record for a public health purpose. Therefore, any student at any education level who produces their vaccination records as a requirement for school entry, whether in paper form or by granting access to an electronic immunization registry, may by default disclose their COVID-19 vaccination status if it is available on the student's full immunization record. This is another critical point, as public schools (elementary and secondary) are required by Ind. Code § 20-34-4-1 to keep an immunization record of each of its students and Ind. Code § 21-40-5-2 requires public universities to do the same for its residential on-campus students. While access to CHIRP records is not a violation if the student, faculty, or staff member grants such access, IU's requirement of proof of COVID-19 vaccination may make individuals feel compelled to do so. Again, this requirement of proof would violate Ind. Code ch. 16-39-11.

Emergency Use Authorization for Medical Products

Some may question whether Purdue or IU's policies violate regulations under the federal emergency use authorization statute. That requires individuals receiving the unapproved⁵ product are informed of the option to accept or refuse the vaccine administration, the consequences of refusing the vaccine, and any alternatives to the vaccine that may exist. 21 U.S. Code § 360bbb–3. Although none of manufacturers of the COVID-19 vaccine have yet received full regulatory approval from the Food and Drug Administration ("FDA"), the vaccine has been approved for use under this statute. 21 U.S. Code § 360bbb–3 requires that individuals be informed of the options and consequences, but it does not explicitly prohibit an entity from mandating a vaccine, even if it is experimental.

CONCLUSION

Public universities, and their boards of trustees, are created through statute and receive their corporate powers through legislation. There is no statutory exemption for public universities under Ind. Code ch. 16-39-11, so the new law applies to public universities. Given the other statutory requirements and general wide latitude with vaccinations, as currently communicated, Purdue's stated plans do not seem to be in violation of the new law. In this case, students have two options – get the vaccine (and provide the documentation) or be subject to mandatory testing. Even if students get vaccinated, they don't have to show proof of vaccination if they are willing to be subject to testing. IU, on the other hand, unquestionably violates the new law by requiring its students, faculty, and staff to show proof of immunization as a condition of continued attendance or employment.

Sincerely,

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^[1] <https://www.iu.edu/covid/faq/index.html>

^[2] Ind. Code §§ 21-19-2-3 (Ball State University); 21-20-2-2 (Indiana University); 21-21-2-2 (Indiana State University); 21-22-2-3 (Ivy Tech); 21-23-2 (Purdue University); 21-24-2 (University of Southern Indiana); and 21-25-2 (Vincennes University).

^[3] <https://protect.purdue.edu/updates/role-of-covid-19-vaccine-in-fall-2021-operations/>

^[4] <https://news.iu.edu/stories/2021/05/iu/releases/21-covid-19-vaccine-to-be-required-at-indiana-university.html>

^[5] "Unapproved" in this sense means that it has not yet received regulatory FDA approval through the full process.

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